Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

HEATHER ANN SEWELL,

Petitioner,

v.

TOWN OF LAKE HAMILTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COURT SHOULD RECONSIDER *MONELL V. NEW YORK CITY DEPT. OF SOCIAL SERVS.* AND OVERRULE OR CLARIFY THE CONSTRUCTION OF 42 U.S.C. §1983 THAT CONDITIONS MUNICIPAL LIABILITY FOR CONSTITUTIONAL INJURIES UPON A MUNICIPAL POLICY OR CUSTOM THAT CAUSES THE INJURY?

II. WHETHER THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH ITS PRIOR OPINION IN *VINEYARD V. COUNTY OF MURRAY* BY CREATING AN EXCEPTION TO 42 U.S.C. §1983 LIABILITY BASED ON THE NATURE OF THE MUNICIPAL EMPLOYEE'S CONDUCT THAT INFLICTS THE CONSTITUTIONAL INJURY, EVEN THOUGH THE MUNICIPALITY MAINTAINED POLICIES AND CUSTOMS WITH DELIBERATE INDIFFERENCE TO THE RIGHTS OF ITS CONSTITUENTS AND THOSE POLICIES AND CUSTOMS WERE THE MOVING FORCE BEHIND THE INJURY?

III. SHOULD A MUNICIPALITY BE EXONERATED FROM MUNICIPAL LIABILITY UNDER 42 U.S.C. §1983 BASED ON THE NATURE OF THE MUNICIPAL EMPLOYEE'S CONDUCT THAT INFLICTS THE CONSTITUTIONAL INJURY, EVEN THOUGH THE MUNICIPALITY MAINTAINED POLICIES AND CUSTOMS WITH DELIBERATE INDIFFERENCE TO THE RIGHTS OF ITS CONSTITUENTS AND THOSE POLICIES AND CUSTOMS WERE THE MOVING FORCE BEHIND THE INJURY?

QUESTIONS PRESENTED – Continued

IV. WHETHER THE ELEVENTH CIRCUIT'S OPINION CONFLICTS WITH *CITY OF CANTON V. HARRIS* BY EXCUSING A MUNICIPALITY FROM 42 U.S.C. §1983 LIABILITY BASED ON THE CONDUCT OF THE MUNICIPALITY'S EMPLOYEE WHEN THE MUNICIPALITY ADMITTEDLY MAINTAINED CUSTOMS AND POLICIES OF INADEQUATE TRAINING, SUPERVISION, AND REPORTING AND HANDLING OF CITIZEN COMPLAINTS AGAINST POLICE OFFICERS WITH DELIBERATE INDIFFERENCE TO THE RIGHTS OF ITS CONSTITUENTS AND THOSE POLICIES AND CUSTOMS WERE THE MOVING FORCE BEHIND THE INJURY?

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PETITION FOR WRIT OF CERTIORARI

Heather Ann Sewell petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 21, 1997.

OPINIONS BELOW

The opinions below are:

1. July 21, 1997, opinion of the United States Court of Appeals for the Eleventh Circuit, *Heather Ann Sewell v. Town of Lake Hamilton*, 117 F.3d 488 (11th Cir. 1997). (Appendix App. 1).

2. March 7, 1995, Order from United States District Court, Middle District of Florida, Tampa Division. (Appendix App. 7).

3. May 2, 1995, and November 21, 1995, Judgments of the United States District Court, Middle District of Florida, Tampa Division. (Appendix App. 8 and App. 9).

JURISDICTION

The Court of Appeals entered its judgment on July 21, 1997. This Petition for Writ of Certiorari has been filed within ninety days of that judgment. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. District Court Jurisdiction.

The jurisdiction of the United States District Court was invoked under 28 U.S.C. §1331 because Ms. Sewell's claim arose under 42 U.S.C. §1983.

B. Procedural Summary.

Heather Ann Sewell sued the Town of Lake Hamilton under 42 U.S.C. §1983 for damages resulting from a Lake Hamilton police officer's sexual assault of Ms. Sewell. A federal jury in Tampa, Florida, determined that Ms. Sewell proved all the elements of a §1983 claim and entered a verdict in her favor, resulting in a judgment for damages, costs, and attorneys' fees. Lake Hamilton appealed, claiming among other issues that the District Court erred in failing to grant Lake Hamilton's motion for summary judgment and motion for judgment as a matter of law. The United States Court of Appeals for the Eleventh Circuit held that the District Court wrongly denied the motions for summary judgment and for judgment as a matter of law and reversed the judgment, remanding the case for entry of a judgment in favor of Lake Hamilton.

C. The Facts.

1. The Assault On Heather Ann Sewell.

At approximately 3:00 a.m., May 13, 1991, Heather Ann Sewell was driving home when she was stopped by Lake Hamilton Police Officer Paul Stines. Officer Stines advised Ms. Sewell that her car fit the description of "a drug user's car" and asked for permission to search the car, which she granted. Officer Stines claimed to find a small bag of marijuana in her car. Officer Stines began

interrogating Ms. Sewell and asked whether she used illegal drugs and whether she "gave rides to any black people." Ms. Sewell, who had never used illegal drugs, became frightened and began crying. (R5:106; 66-73)

Officer Stines then changed his demeanor and began calling Ms. Sewell "Heather" and instructed her to call him "Paul." He introduced sexual innuendo into the conversation and commented that a woman had once made sexual overtures to him in an attempt to avoid a traffic ticket. He asked Ms. Sewell about her boyfriend. Alone and in the middle of the night, Ms. Sewell believed Officer Stines intended to abduct and rape her. (R5:106; 73-76)

Officer Stines then ordered Ms. Sewell to follow him to the police station so he could "look through some law books" and decide what to do. Ms. Sewell was relieved because she assumed other police officers would be at the police station and would supervise Officer Stines's behavior and protect her from his advances. Before embarking on the trip to the Lake Hamilton police station, Officer Stines warned Ms. Sewell not to try to escape because he knew where she lived. (R5:106; 74-76)

Upon arrival at the Lake Hamilton Police Station, Officer Stines informed Ms. Sewell that the two of them would be the only people there. As discussed below, consistent with Lake Hamilton's policies and customs, Officer Stines, a rookie of seven months, was the only officer on duty and had no supervision. Ms. Sewell considered fleeing, but remained out of fear that Office Stines would shoot her if she tried to escape. (R5:106; 76)

Officer Stines and Ms. Sewell entered the Lake Hamilton police station at 3:30 a.m. Inside the station, and after purporting to conduct legal research, Officer Stines advised Ms. Sewell that the amount of marijuana he claimed he found in her car was sufficient to keep Ms. Sewell in jail overnight. He arrested her, read her the *Miranda* warnings, and advised her that an arrest would

be on her record forever. Ms. Sewell started crying again, knowing that she had been wrongfully arrested because the marijuana was not hers. (R5:106; 78)

Officer Stines then proposed a solution – he would allow Ms. Sewell to go home if she would allow him to "strip search" her. Ms. Sewell refused, but stated she would consent to a strip search by a female officer. Officer Stines then issued an ultimatum: submit to a strip search by him or be arrested and jailed for drug possession. Although Ms. Sewell feared Officer Stines would rape and kill her, she again refused to consent to a strip search. Officer Stines became agitated and announced that Ms. Sewell would be incarcerated overnight. (R5:106; 81-83)

Officer Stines then offered one last time to release Ms. Sewell in exchange for her submission to a strip search and added that, if Ms. Sewell had made a sexual advance toward him, he would have "taken [her] up on it." At this point, Ms. Sewell believed she was "going to get raped no matter what I was going to do; that one way or another, it was going to happen, and he was just building up to it." Officer Stines then told Ms. Sewell that he would let her go home if she would let him "sexually harass" her. She began sobbing uncontrollably and begged Officer Stines to let her go. He remarked "I can see this is going nowhere," and continued to fill out an arrest form. (R5:106; 86-87)

Faced with the prospect of being jailed on false drug charges and in fear of her life, Ms. Sewell, still sobbing, told Officer Stines that he could do whatever he wanted if she "could just go home." Officer Stines did just that. (R5:106; 88-89)

He began by fondling her breasts through her clothes. He then instructed her to take off all of her clothes, lie naked, and spread her legs, on Lake Hamilton's police station floor. As she lay naked on the police

station floor, spread eagle, sobbing and shaking uncontrollably, Officer Stines continued to fondle her breasts and between her legs. Ms. Sewell cried and begged Officer Stines to please stop and let her go home. Officer Stines told Ms. Sewell "[I've] never had a redhead before." Officer Stines continued to molest Ms. Sewell for what she said felt like forever. Finally, he allowed her to rise and get dressed. Before letting her go, however, Officer Stines warned Ms. Sewell never to tell anyone what he had just done to her, or he would prosecute her on the drug charges. Despite Officer Stines's threats, Ms. Sewell reported the assault to the State's Attorney the next day. Officer Stines was arrested, confessed to the crime, and was convicted and imprisoned. (R5:106; 90-93, 109-110, 135-136)

2. Officer Stines's Assault On Sharon Washington.

At approximately 2:15 a.m., May 13, 1991, one hour and fifteen minutes before Officer Stines and Heather Sewell arrived at the Lake Hamilton police station, Officer Stines stopped a woman named Sharon Washington. Officer Stines ordered Ms. Washington out of her car and stated that he needed to search her because "sometimes women carry weapons on them." Officer Stines then "searched Ms. Washington by touching her breasts and between her legs, while she faced him." After the search, Officer Stines commented to Ms. Washington that many women offer him "their bodies in order not to write them tickets." Receiving no such offer, Officer Stines issued Ms. Washington a ticket for speeding. (R5:108; 3-9)

Ms. Washington drove home and advised her boyfriend of the assault by Officer Stines. Her boyfriend became extremely upset and immediately called the Lake Hamilton police department. Because Lake Hamilton's police station was empty, the call was routed to Lake Hamilton's borrowed dispatcher in a neighboring town,

who received the call at 3:11 a.m., almost twenty minutes before Officer Stines arrived at the police station with Ms. Sewell and close to an hour before his assault on her. Ms. Washington's boyfriend told the dispatcher that a Lake Hamilton police officer, badge number 204, had molested Ms. Washington. The boyfriend demanded to speak "to the police chief, whoever was in charge." The dispatcher was confused and did not know what to do, because Lake Hamilton had given her no instruction about what to do in such a circumstance. Lacking any policy or guidance from Lake Hamilton, the dispatcher told Ms. Washington's boyfriend that the chief was not on duty and to try again during normal business hours. As a result, Lake Hamilton's police chief did not learn until the next day that the nighttime dispatcher had received a complaint against Officer Stines for sexual misconduct almost one hour before Officer Stines assaulted Ms. Sewell. (R5:108; 9-14; R5:106; 151-158)

3. Lake Hamilton's Policies, Customs, And Procedures.

As of May 13, 1991, the policymaker for Lake Hamilton's police department was Chief Freeman. Chief Freeman had been responsible for formulating and implementing policies and customs governing Lake Hamilton's police department since he became police chief in 1985. Lake Hamilton had no written policies or procedures governing any aspect of police work and no written or oral policies or procedures regarding sexual harassment of suspects (or anyone). Chief Freeman admitted knowing that Lake Hamilton needed written policies and procedures, but that he neglected that need. He testified that, although he had intended to prepare and implement written policies, he simply had not "gotten around to it" during his first six years as Lake

Hamilton's police chief. (R5:108; 41, 82-83, 129-130, 132, 140; R5:109; 46)

Ms. Sewell presented expert testimony that standard practice is for police departments to have written guidelines, policies, and procedures. Even Lake Hamilton's expert on police procedures admitted: "They should have had written policies. There really is no reason not to." (R5:109; 43, 148)

Although the evidence at trial was unanimous that rookie police recruits need formal field training beyond what is taught at the police academy, Lake Hamilton had no formal program for training its officers. Chief Freeman was aware of formal field officer training programs, which typically last three to six months and provide rookie recruits with systematic training and practical guidance on how to handle real life situations. Nonetheless, Chief Freeman instituted no such training for Lake Hamilton's police department during his six years as the chief. (R5:108; 25, 55-56; R5:109; 63-64, 176-177)

Chief Freeman hired Officer Stines from the police academy in November, 1990, seven months before Officer Stines assaulted Ms. Sewell. Officer Stines's "training" consisted of "riding around" Lake Hamilton with other police officers for two weeks. Because there was no formal training program, what Officer Stines had the opportunity to learn was fortuitous, depending on what situations he encountered. Significantly, neither Officer Stines nor any other Lake Hamilton police officer received any training or guidance in sexual harassment, frisking of female suspects, procedure for arresting and detaining female suspects, and the like. (R2: 56; 4-6; R5:108; 125)

Lake Hamilton had no policy or procedure regarding the treatment of female suspects by its all male police force. Lake Hamilton police officers testified that the town lacked any policy, oral or written, concerning proper procedure for frisking a female suspect, proper

procedure for detaining and transporting a female suspect to an unoccupied police station house, guidelines under which strip searches were appropriate, or whether a lone male police officer should request backup to join him at the station when transporting a woman there late at night. As stated previously, Lake Hamilton had no policy regarding sexual harassment. Instead, Lake Hamilton's police officers were governed solely by their own discretion. (R5:108; 28, 33-36, 66, 69-70, 159, 167-169, 174-175, 180)

In addition to having no written policies on police procedure, no written or oral policies on sexual harassment or treatment of female suspects, and no formal training for new officers, Chief Freeman admitted that Lake Hamilton violated Florida law by failing to implement and maintain a policy or system for receiving, investigating, and determining citizen complaints lodged against police officers.[1] Chief Freeman testified that he had received between "a dozen and two dozen" complaints against Lake Hamilton police officers during his tenure as police chief, but he could not be specific because the Police Department had never documented any of the complaints. (R5:108; 181-184)

Lake Hamilton maintained a custom of staffing its midnight shift with one male police officer. The officer working the midnight shift was not supervised, directly or indirectly. Instead, Lake Hamilton's policy in May of 1991 was for the lone male police officer on duty during the midnight shift to "supervise himself." The policy applied to rookie officers like Officer Stines. (R5:108; 169-172, 180-181)

Lake Hamilton also had a policy as of May, 1991, to leave its police station unmanned during the midnight

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[1] Section 112.533, *Florida Statutes*, required Lake Hamilton to have such a system.

shift. Rather than place a dispatcher in its own police station at night, Lake Hamilton used a dispatcher located in a neighboring town. Lake Hamilton had no policy, procedures, or guidelines governing the circumstances under which the night dispatcher should contact the chief of police or next-ranking officer in the event of a citizen complaint of misconduct by the lone officer on duty. As a result, before Ms. Sewell's assault by Officer Stines, Lake Hamilton provided no guidance, instruction, or procedure – oral or written – to the borrowed dispatcher as to what to do upon receiving a complaint of misconduct. (R2:56; 8-9; R5:108; 161-162, 174)

Chief Freeman, the policymaker for the Lake Hamilton police force, testified that he maintained his custom of employing an unsupervised, male police officer on the midnight shift despite the risk that, under those circumstances, a police officer might sexually molest a woman, which is precisely what happened in this case. Chief Freeman testified in his deposition:

> Q: I'd like to ask you if you were aware prior to May 13th, 1991 of any risks or dangers associated with allowing a lone or sole male police officer to detain a female person? You have just one male police officer and a female person, is there any danger with that?
>
> A: I guess there could be. Yes sir.
>
> Q: Were you aware of those dangers before May 13th, 1991?
>
> A: Yes sir.
>
> Q: What are some of those dangers?
>
> A: I guess there could be any danger. I mean, in reference to this one with Officer Stines, the officer taking advantage of a prisoner while being under arrest.

(R5:108; 207) Chief Freeman also testified at trial:

> Q: Despite the fact that you knew of the risk of a sexual assault by a lone male police officer to a

woman like Heather Sewell, that a risk was created by all those policies you just described you still allowed those policies to exist in the Town of Lake Hamilton, didn't you?

A: Yes sir.

(R5:108; 209)

4. The Link Between Lake Hamilton's Policies, Customs, And Procedures And Officer Stines's Assault On Heather Sewell.

Ms. Sewell proved that Lake Hamilton's policies and customs were the moving force behind Officer Stines's assault in three different ways. First, Ms. Sewell presented evidence of the link between inadequate training and the assault. Dennis Waller, Ms. Sewell's police procedures expert, testified that Lake Hamilton's police policies and procedures were entirely inadequate. He testified that, if Lake Hamilton had implemented adequate written policies and procedures governing the authority, discretion, and discipline of police officers, Officer Stines's harassment and molestation of Ms. Sewell "never would have happened." Officer Stines testified that his improper conduct would have been prevented by "a standardized set of policies and procedures." (R2:56; 11; R5:108; 125; R5:109; 42-45, 52-59, 63-73).

Secondly, proper supervision would have prevented Officer Stines's assault on Ms. Sewell. In addition to the testimony from Ms. Sewell's police expert, Officer Stines testified to the obvious – that the presence of another Lake Hamilton police officer on the midnight shift would have made his improper conduct "less likely." He testified that he would have been deterred from his actions by the presence of any other employee at the police station. (R2:56; 10-11; R5:108; 125).

Lake Hamilton's inadequate training and supervision, however, was not the sole cause of this assault. The

third causal link was Lake Hamilton's failure to have any policy or procedure regarding complaints received from the nighttime dispatcher. Ms. Sewell's expert, Mr. Waller, testified that if Lake Hamilton had properly instructed its dispatcher to immediately call the police chief upon receiving a citizen complaint of misconduct by the sole officer on duty during the nightshift, Ms. Sewell would not have been molested. In unrebutted testimony, Mr. Waller testified that a dispatcher call reporting the assault on Sharon Washington to Chief Freeman should have prompted Chief Freeman to immediately contact Officer Stines via radio. This radio inquiry would have occurred before Officer Stines transported Ms. Sewell to the unoccupied Lake Hamilton police station. Mr. Waller testified that, if such a radio inquiry had been made, "Heather Sewell would not have been assaulted." (R5:109; 70-71)

REASONS FOR GRANTING THE PETITION

This Court recently addressed municipal liability under 42 U.S.C. §1983 in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ___, 137 L.Ed.2d 626, 117 S.Ct. ___ (1997). In separate dissents, Justice Souter and Justice Breyer each recognized that this area of the law is unsettled, highly complex, and difficult to apply and, joined by Justices Stevens and Ginsburg, called for a reexamination of *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). Justice Breyer concluded his dissent:

> Nonetheless, for the reasons I have set forth, I believe the case for reexamination is a strong one. Today's decision underscores this need. Consequently, I would ask for further argument that would focus upon the continued viability of *Monell's* distinction between vicarious municipal liability and municipal liability based upon policy and custom.

520 U.S. at ___, 137 L.Ed.2d at 660. Justice Souter similarly observed:

> Despite arguments that *Monell's* policy requirement was an erroneous reading of §1983 . . . , I had not previously thought that there was sufficient reason to unsettle the precedent of *Monell*. Now it turns out, however, that *Monell* is hardly settled. That being so, Justice Breyer's powerful call to reexamine §1983 municipal liability afresh finds support in the Court's own readiness to rethink the matter.

520 U.S. at ___, 137 L.Ed.2d at 656.

The opinion on review is a compelling example of the complexity and confusion in the area of §1983 law. In reversing the District Court's judgment, the Eleventh Circuit ignored its own precedent, rendered a holding inconsistent with precedent from this Court and that of other circuits, and relied on an undefinable legal test that is impossible to apply in any consistent manner.

The Eleventh Circuit's decision in this case is erroneous. The standard of municipal liability under 42 U.S.C. §1983 is an important question. This case presents the Court with a timely opportunity to review and clarify the law governing this important subject.

I. The Standard For Municipal Liability Under §1983.

In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), the Court held that municipalities are liable for constitutional torts only when the execution of a municipal policy or custom inflicts the injury. In *City of Canton v. Harris*, 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989), the Court held that a plaintiff asserting municipal liability on the theory that a facially lawful municipal action has caused injury must demonstrate that the municipal action was taken with "deliberate indifference" to its known or obvious consequences. The plaintiff must further establish that the

municipal policy or custom was the "moving force" behind the injury. In *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ___, 137 L.Ed.2d 626, 117 S.Ct. ___ (1997), the Court emphasized that "deliberate indifference" is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." 520 U.S. at ___, 137 L.Ed.2d at 643. In *Pembaur v. Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986), the Court recognized that a single incident can be sufficient as the basis for municipality liability, so long as the other elements of §1983 liability are present.

Municipal policy is created by "a decision-maker possess[ing] final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 75 U.S. at 481, 89 L.Ed.2d at 464. A custom is defined as "persistent and widespread . . . practices . . . of officials" and exists for §1983 purposes if it is a daily occurrence or the common and routine practice of the town. *Monell*, 463 U.S. at 658. The absence of adequate policies and procedures constitutes a custom – or a policy itself – that also gives rise to municipal liability. In *Canton*, the Court recognized that a policy or custom of inadequate training or supervision can create liability. *See, also, Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.), *cert. denied*, 126 L.Ed.2d 594, 114 S.Ct. 636 (1993). Where a situation obviously calls for procedures, rules, or regulations, a municipality's failure to make policy is equally actionable. *See, generally, Anderson v. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985); *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981); *Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1981), *cert. dismissed*, 456 U.S. 604, 72 L.Ed.2d 366, 102 S.Ct. 2226 (1982).

As defined by this Court in *County Commissioners of Bryan County*:

> We have, finally, identified a municipal policy in a third situation, even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the Government "is so obvious, in the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policy make[r] . . . can reasonably be said to have been deliberately indifferent to the need." (Citation omitted)

137 L.Ed.2d at 648. Deliberate indifference can be shown as a result of notice of prior actions by subordinate officers or:

> Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference.

Id. at 648.

The final element of §1983 liability is "the link between the policymaker's inadequate decision and the particular injury alleged." *Id.* at 643. As explained by Justice Souter:

> But that is simply to say that the tortious act must be proximately caused by the policymaker. The policy requirement is the restriction that bars straight forward *respondeat superior* liability, and the need to "test the link" is merely the need to apply the law that defines what a cognizable link is.

County Commissioners of Bryan County, 520 U.S. at ___, 137 L.Ed.2d at 653, J. Souter dissenting.

II. The Eleventh Circuit's Opinion Conflicts With Its Prior Opinion In *Vineyard v. County of Murray, Georgia.*

On appeal below, Ms. Sewell argued that this case is governed by *Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.), *cert. denied*, 126 L.Ed.2d 594, 114 S.Ct. 636 (1993). In *Vineyard*, an arrestee in a domestic dispute was hospitalized for injuries he sustained during the dispute. When sheriff's deputies arrived at the hospital, they handcuffed him to a bed in the emergency room. 990 F.2d at 1209. Fearful of a suicide attempt, the deputies and hospital personnel attempted to forcibly empty Vineyard's stomach by making him drink a substance that would make him vomit. When he refused, the deputies made the hospital personnel to leave the room and proceeded to beat Vineyard in the head and chest while he was handcuffed to his hospital bed. *Id.* at 1209.

Vineyard sued the county for §1983 municipal liability, alleging inadequate policies for training, supervision, and discipline of its deputies. One of the cited deficiencies was that "the dispatcher or whoever answers the phone had discretion about the initial handling of the complaint." Additionally, the department failed to keep a log of citizen complaints and lacked any written policies and procedures.

After a jury returned a verdict in Vineyard's favor, the county appealed the denial of its motion for directed verdict. The Eleventh Circuit affirmed the denial of the directed verdict, recognizing that the failure to train, supervise, and discipline constitutes official "policies or customs of the local police department." 990 F.2d at 1211-1212. Applying this Court's holding in *Canton*, the Eleventh Circuit found that substantial evidence supported the jury's conclusion that the county acted in deliberate indifference to the rights of its citizens and that

the county's policies were the moving force behind the constitutional deprivation.

The proof presented in this case parallels the evidence in *Vineyard*. In each case, the failure to establish policy or the tolerance of an inadequate procedure constituted the municipal "policy or custom" for purposes of §1983 liability. In this case, Ms. Sewell proved that Lake Hamilton had adopted policies or maintained customs of abdicating control by:

> 1. Failing to implement any written policies or procedures governing the authority or discretion of its police officers;
>
> 2. Failing to adequately train rookie recruits;
>
> 3. Violating Florida law by failing to implement and maintain a policy or system regarding the receipt, investigation, and determination of citizen complaints against police officers;
>
> 4. Staffing its midnight shift with a lone male police officer (in this case, an inadequately trained rookie officer);
>
> 5. Maintaining a policy of not supervising the lone male police officer working the midnight shift;
>
> 6. Failing to implement or enforce any policies or procedures regarding the treatment of female suspects by lone male police officers;
>
> 7. Failing to implement or enforce any policies regarding sexual harassment of suspects, detainees, or any other persons; and
>
> 8. Maintaining a policy of not supervising, instructing, or training the borrowed, nighttime dispatcher regarding how to handle or respond to citizen complaints of police misconduct.

Ms. Sewell proved that Chief Freeman maintained these inadequate policies with deliberate indifference toward the rights of his constituents. This proof came

from Chief Freeman himself, who candidly acknowledged that his policies created the risk of a police officer assaulting a female suspect. **It is difficult to imagine direct evidence of deliberate indifference more compelling than the following admission by Chief Freeman:**

> Q: Despite the fact that you knew of the risk of a sexual assault by a lone male police officer to a woman like Heather Sewell, that a risk was created by all those policies you just described you still allowed those policies to exist in the Town of Lake Hamilton, didn't you?
>
> A: Yes sir.

Finally, Ms. Sewell proved that Lake Hamilton's policies and customs proximately caused her injury. Both expert testimony and the testimony of Officer Stines established that Officer Stines's assault on Heather Sewell would not have occurred had Lake Hamilton maintained appropriate policies and procedures for training, supervision, and processing of complaints.

Although Ms. Sewell presented substantial evidence to support the jury's verdict that she established all the elements of §1983 municipal liability in accordance with *Vineyard*, which is consistent with this Court's precedents, the Eleventh Circuit ignored its prior opinion in *Vineyard* and ignored most of the evidence as well. Although the appellate briefs discussed *Vineyard* in detail, the Eleventh Circuit did not cite *Vineyard*. Instead, the court relied on the following language from *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 972, 113 S.Ct. 1412, 122 L.Ed.2d 784 (1993):

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens. . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response . . . is obvious to all without

> training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

117 F.3d at 490, quoting *Walker*, 974 F.2d at 299-300.

The Eleventh Circuit's holding in this case conflicts squarely with *Vineyard*. The implication of the holding is that a police officer's abuse of his authority to sexually harass and assault a woman is so obviously wrong that no amount of training or supervision can prevent the wrong. That holding directly ignores the evidence in the case from Chief Freeman, Ms. Sewell's expert witness, and Officer Stines himself.

The opinion below cannot be reconciled with *Vineyard*. Is it not "obviously wrong" to savagely beat a sick arrestee while he is handcuffed to a hospital bed? On appeal below, Lake Hamilton argued that *Vineyard* was simply an excessive force case and that, because some level of police force is expected and necessary, it is necessary to train against the use of excessive force. That argument may apply to some cases, but not to *Vineyard*. A bright line exists between a difficult decision made in the heat of action between two levels of force, on the one hand, and a wrong decision made, where there is no threat to an officer's safety, to beat a sick man handcuffed to a bed.[2]

Because of the great importance of the question of municipal liability, and because of the confusing, complex status of the law in that area, the conflict between the

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[2] Ironically, the Eleventh Circuit's reasoning would result in Lake Hamilton being liable for Officer Stines's improper frisking of Sharon Washington, but not liable for his assault on Heather Sewell. After all, frisking is an expected and necessary part of police work, while sexual harassment and assault are not.

Eleventh Circuit's decision below and its decision in *Vineyard* warrants the exercise of this Court's jurisdiction. *See, e.g., John Hancock Mutual Life Ins. Co. v. Bartels*, 308 U.S. 180, 84 L.Ed. 176, 60 S.Ct. 221 (1939).

III. The "Obviously Wrong" Test Is Wrong.

A. The Test Is Legally Wrong.

The *Walker* opinion articulates a three-part test for §1983 municipal liability that conforms to this Court's precedents, but then proceeds to engraft an exception to that liability. The exception described in *Walker*, and expressly adopted by the Eleventh Circuit below, is that when the proper response by a municipal employee to a certain situation is so obvious that the failure to train or supervise would not have made a difference, the municipality is not liable. This exception misinterprets *City of Canton*. In *City of Canton*, the Court held that to prove deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. The test under *Canton* is thus not whether the employee's conduct is obviously wrong, but whether the need for additional or different training or supervision is "obvious" in view of the duties assigned to police officers and the situations officers will confront.

Ms. Sewell proved at trial that Lake Hamilton's inadequate training and supervision was not only likely to cause a wrong decision, but in fact, caused Officer Stines to commit his assault. Even without Chief Freeman's candid acknowledgment of the risk created by his failure to implement any policy, common sense commands that the need to train and supervise a rookie, male police officer working a midnight shift alone in the proper treatment and detention of a female suspect is obvious.

The test articulated in *Canton* is a traditional test of causation, readily susceptible to interpretation and application. On the other hand, the test applied below is unintelligible, undefinable, and irreconcilable with prior precedent. Referring to *Vineyard*, can it reasonably be posited that the decision to beat an unarmed, ill arrestee handcuffed to a hospital bed is not obviously wrong, but the decision to abuse one's authority in exchange for sexual favors is? Moreover, what is obviously wrong to some is not obviously wrong to others. Undoubtedly, a formulation of "obviously wrong" conduct will be subjective and will vary from case to case and from employee to employee.

Perhaps the most troubling aspect of the opinion below is that it ignores factual causation and traditional notions of legal causation and substitutes a backwards causation analysis that depends on the nature of the employee's conduct. **Under this test, if the employee's conduct is egregious enough, the court concludes not just that there is no causation, but that there is no municipal fault to begin with.** The fallacy of this approach is readily observable. As discussed previously, a plaintiff must prove:

1. A municipal "policy or custom";
2. That the policy was maintained with "deliberate indifference" towards the constitutional rights of persons such as the plaintiff; and
3. That the policy or custom was the "moving force" behind the plaintiff's injury.

Elements 1 and 2 will always exist independently of and, in most instances, before element 3. **In other words, if a municipality maintains a certain policy or custom with deliberate indifference, the municipal conduct – or fault – will exist independently of and, usually, before the employee's conduct that produces the injury.**

In the opinion below, the Court reversed these elements and examined the employee's conduct to determine whether Lake Hamilton's policies and customs were maintained with deliberate indifference. That test defies logic as well as the evidence. Ms. Sewell proved to the Judge and Jury's satisfaction that Lake Hamilton maintained the policies and customs enumerated and discussed in this petition. Ms. Sewell also established through Chief Freeman's own testimony that those policies or customs were maintained with deliberate indifference because Chief Freeman knew the city's policies created the risk of a lone male police officer sexually assaulting a female suspect. The Eleventh Circuit ignored that proof and, instead, looked at the nature of Officer Stines's conduct to perform an after the fact evaluation of whether Lake Hamilton's policies were maintained with deliberate indifference. Because of the Court's conclusion that Officer Stines's behavior was so obviously wrong that training or supervision could not have prevented it, the Court then concluded that the policies were not maintained with deliberate indifference. This test places the horse after the cart and then, depending on the nature of the cart, determines whether the horse exists at all.

On appeal below, Lake Hamilton argued a distinction between sexual assault and the use of excessive force. That argument, however, proves the fallacy of the logic used below. There is no doubt that, in view of Lake Hamilton's abysmal failure to train, supervise, or instruct officers in many important matters, that if Officer Stines had used excessive force on Heather Sewell, a §1983 violation would exist. However, because Officer Stines, instead of using excessive force, abused his position of authority to force Ms. Sewell into sexual submissiveness, no violation exists. That reasoning produces the absurd result that the more egregious the employee's conduct, the more likely the exoneration of the municipality, despite the fact that the municipality was at fault.

B. The Obviously Wrong Test Is Factually Wrong.

The Eleventh Circuit concluded as a matter of fact – and in defiance of the evidence in this case – that the decision by an untrained, rookie, male police officer not to sexually harass and then molest a female suspect should be so obvious that it cannot possibly be affected by proper training or supervision. That is a startling conclusion indeed in today's society.

Congress and State Legislatures have determined that laws are necessary to define appropriate sexual behavior. The Equal Employment Opportunity Commission requires that employers post conspicuous notices and implement exacting policies and guidelines regarding appropriate sexual behavior. Our military is plagued by improper conduct between the sexes. Social, political, and religious leaders debate appropriate sexual behavior. Some say that men "just don't get it." Yet the Eleventh Circuit, without evidence or elaboration, concluded that appropriate sexual behavior for an untrained, rookie officer is so obvious that no training or supervision is necessary.

Federal courts have struggled with §1983 cases involving sexual misconduct. In *Scott v. Moore*, 114 F.3d 51 (5th Cir. 1997), the court found no liability based on the sexual assault of a pretrial detainee in prison, because (1) there was no history of misconduct to put the governmental agency on notice of the risk and (2) the city had significant policies and procedures in place that had prevented such misconduct for more than twenty years. 114 F.3d at 54-55. In a spirited dissent, Circuit Judge Wisdom explained the difficulty faced by courts in cases involving sexual misconduct:

> Today, a majority of this Court sitting en banc concluded that the sexual assault of a pretrial detainee at the hands of an unsupervised male guard does not justify even the development of

> a record in the District Court. I cannot concur in such a result. . . .
>
> [In a previous appeal in the same case], we concluded that this case had identified a developing issue; the same issue that is illustrated by the explosion of sexual harassment cases in this country, and by the problems encountered in the military of late. **The issue concerns the realities of human nature in situations where one individual occupies a position of substantial authority relative to another. The situations or, more accurately, relationships are myriad: supervisor to employee, military officer to soldier, guard to pretrial detainee. Whatever the relationship, it is abundantly clear that our society is beginning to recognize these as potentially volatile situations.** (footnotes omitted, emphasis added)

114 F.3d at 55-56. In this case, Chief Freeman knew he had a volatile situation, but deliberately chose not to act.

Other cases illustrate this difficult issue as well. *See, e.g., Haberthur v. City of Raymore, Missouri*, 119 F.3d 720 (8th Cir. 1997) (reversing the dismissal of a §1983 complaint based on a police officer's sexual harassment and sexual assault of a citizen); *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997) (affirming a summary judgment for defendant in a §1983 claim based on inadequate training in connection with strip search of a female arrestee; no prior incidents *and* sufficient policies in place); *West v. Waymire*, 114 F.3d 646 (7th Cir. 1997) (affirming summary judgment for defendant based on police officer's sexual molestation of 13 year old girl; risk that police officer was a "child molester" not obvious to policymaker).

IV. The Eleventh Circuit's Opinion Conflicts With This Court's Opinion in *City of Canton v. Harris*

In *City of Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S.Ct. 1197 (1989), this Court recognized that the failure to train and supervise can be the basis for municipal liability under §1983. In *Canton*, the Court established a three-part test for §1983 liability based on a claim of failure to train and supervise:

> 1. The policymaker must know "to a moral certainty" that employees will confront a given situation.
>
> 2. The situation must either present the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation.
>
> 3. The Plaintiff must show that the wrong choice by the City employee will frequently cause the deprivation of a citizens constitutional rights.

City of Canton, 489 U.S. at 390-391, 103 L. Ed 2d at 427-428; *see also, Walker v. City of New York*, 974 F.2d at 297-298.

In this case, Ms. Sewell established that Chief Freeman knew to a moral certainty that a lone male police officer working the midnight shift would confront female suspects. That such a situation will occur is obvious. Regarding the second prong of the test, *Walker* provides one example of a difficult choice as whether to use deadly force in apprehending a fleeing suspect because "more than the application of common sense is required." 974 F.2d at 297. However, *Walker* defines another "difficult choice" as follows:

> **A choice might also be difficult where, although the proper choice is clear, the employee has powerful incentives to make the wrong choice. (emphasis supplied)**

974 F.2d at 297. That definition applies here. A male police officer in a position of authority, when faced with a female suspect who offers sexual favors in exchange for release or when faced with the temptation to elicit sex in exchange for release, should certainly know the proper course. However, history and human nature tell all that the officer will have a powerful incentive to make the wrong choice. Ms. Sewell presented evidence that training would have made Officer Stines's choice less difficult and that supervision would have made the wrong choice impossible.[3]

Finally, as to the third prong, a wrong choice of the type in this case will always cause the deprivation of a citizen's constitutional rights. Without question, the three-part test established in *Canton* and recognized in *Walker*, applied to the facts of this case, results in §1983 liability.[4]

V. The Court Should Reconsider *Monell*.

As stated above, in separate dissents in *County Commissioners of Bryan County*, four of this Court's justices advocated the revisitation and, perhaps, overruling of this Court's decision in *Monell*. Because *Monell* has produced a complex and inconsistent body of law that causes

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[3] It is essential that the Court bear in mind that while this case is a failure to train and supervise case in part, it also involves Lake Hamilton's other policies of keeping the police station unmanned and failing to provide any instructions to the dispatcher. The evidence established that those policies caused Officer Stines to commit his assault. The Eleventh Circuit completely ignored that aspect of the case in reversing the judgment.

[4] But for the "obviously wrong" exception to §1983 liability, as discussed above, *Walker v. City of New York*, provides an excellent analysis of §1983 liability based on inadequate training and supervision.

nonsensical results such as the one below, the Court should accept the four justices' suggestion that it is time to reconsider *Monell*. As stated by Justice Breyer in his dissent:

> The majority fears that a contrary view of prior precedent would undermine *Monell's* basic distinction [between respondeat superior liability and liability based on custom or policy]. That concern, however, rather than leading us to spin ever finer distinctions as we try to apply *Monell's* basic distinction between liability that rests upon policy and liability that is vicarious, suggests that we should reexamine the legal soundness of that basic distinction itself.

137 L.Ed.2d at 656.

Justice Stevens argued cogently against *Monell's* distinction in dissenting and concurring opinions in *Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) and *Pembaur v. Cincinatti*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986). This case is illustrative of the frustration expressed by Justice Stevens in his concurring opinion in *Pembaur*:

> This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word "policy" – a word that does not appear in the text of 42 U.S.C. §1983, the statutory provision that we are suppose to be construing. The difficulty is thus a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States.

475 U.S. at 487, 89 L.Ed.2d at 467-468.

Likewise, this is not a hard case. Lake Hamilton hired a rookie police officer and provided him no training or instruction of any nature on the arrest, detention, or treatment of female suspects. Contrary to accepted custom in police departments throughout the country, Lake

Hamilton had no written policies, procedures, rules, instructions, or guidelines regarding any aspect of police work. **Amazingly, Lake Hamilton had no policy, oral or written, regarding sexual harassment.** Lake Hamilton allowed its untrained, unsupervised male officer to work a midnight shift alone. Lake Hamilton had no provision in place for citizen complaints about the officer in the middle of the night. Lake Hamilton had no policy or procedure governing how the nighttime dispatcher should handle and respond to a citizen complaint of serious misconduct in the middle of the night while the complained-of officer remained on duty and unsupervised. Lake Hamilton's chief policymaker knew that this set of circumstances created the risk of a police officer assaulting a female suspect, but maintained the policies and procedures nonetheless. As a direct result, Heather Sewell was sexually harassed and assaulted on the floor of the police station – the very building that should represent safety to the citizens of Lake Hamilton.

The introduction to Justice Stevens's dissent in *Oklahoma City v. Tuttle*, graphically illustrates the injustice of the opinion below:

> When a police officer is engaged in the performance of his official duties, he is entrusted with civic responsibilities of the highest order. His mission is to protect the life, the liberty, and the property of the citizenry. If he violates the Federal Constitution while he is performing that mission, I believe that federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual. This conclusion is supported by the text of 42 U.S.C. §1983, by its legislative history, and by the holdings and reasoning in several of our major cases construing the statute. The Court's contrary conclusion rests on nothing more than

> a recent judicial fiat that no litigant had asked the Court to decree.

471 U.S. at 834, 85 L.Ed.2d at 811.

Applying the language of 42 U.S.C. §1983 to the facts of this case should not be difficult. This is the very type of wrong that Congress intended to prevent. However, the injustice engendered by the unsupportable opinion below is a product of the "highly complex body of interpretive law" produced by *Monell*. *See County Commissioners of Bryan County*, 137 L.Ed.2d at 656 (J. Breyer, dissenting).

It seems inescapable to conclude that the current state of §1983 law has become too difficult to apply with any consistency. Municipalities cannot predict or understand their liability. Citizens cannot know their rights. Courts cannot consistently and justly adjudicate. As stated by Justice Stevens in *Pembaur*:

> In other words, as I explained in my dissent in *Oklahoma City v. Tuttle*, 471 U.S. 808, 835-840, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985), both the broad remedial purpose of the statute and the fact that it embodied contemporaneous common-law doctrine, including *respondeat superior*, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.

475 U.S. at 489, 89 L.Ed.2d 469, J. Stevens, dissenting.

The Court should grant this petition and hear argument on the continued viability of *Monell's* distinction between vicarious municipal liability and municipal liability based upon policy and custom. The Court might determine that a revisitation of §1983 and the current, untenable nature of the body of §1983 law since *Monell* requires an overruling of *Monell* and a rule of strict vicarious municipal liability. The Court might determine

that liability based upon policy and custom is appropriate, but use this opportunity to clarify the test and eliminate inconsistent and unjust results such as that reached by the Court of Appeals below. The Court might fashion a new rule, somewhere in between, that can be applied fairly, consistently, and predictably and that will better serve Congress's intent in enacting §1983. For example, the facts of this case would certainly justify a rule that if a municipality maintains customs or policies with deliberate indifference toward any foreseeable harm, the municipality is liable for any harm that has a causal relation to the policy or custom. Such a standard is not strict vicarious liability. At the same time, such a standard would eliminate the complexity and confusion characterized thus far by §1983 jurisprudence as the courts grapple to determine 1983 liability, but struggle to avoid *Monell's* proscription of pure vicarious liability.

Justice Breyer concluded his dissent in *County Commissioners of Bryan County* as follows:

> Nonetheless, for the reasons I have set forth, I believe the case for reexamination is a strong one. Today's decision underscores this need. Consequently, I would ask for further argument that would focus upon the continued viability of *Monell's* distinction between vicarious municipal liability and municipal liability based upon policy and custom.

520 U.S. at ___, 137 L.Ed.2d at 660. This case presents the Court a timely and appropriate opportunity to entertain further argument on this fundamentally important question.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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Attorneys for Heather Ann Sewell, Petitioner

App. 1

Heather Ann SEWELL,
Plaintiff-Appellee,

v.

TOWN OF LAKE HAMILTON,
Defendant-Appellant.

No. 95-2867.

United States Court of Appeals,
Eleventh Circuit.

July 21, 1997.

Arrestee sued town under § 1983, alleging that police officer's alleged sexual molestation of arrestee resulted from failure to train or supervise. The United States District Court for the Middle District of Florida, No. 93-2037-CIV-T-25A, Henry Lee Adams, Jr., J., entered judgment on jury verdict for arrestee. Town appealed. The Court of Appeals, Dubina, Circuit Judge, held that officer's proper response to situation would have been obvious to all without training or supervision.

Reversed and remanded.

D. Andrew DeBevoise, Sophia B. Ehringer, Bobo, Spicer, Ciotoli, Fulford, Bocchino, DeBevoise & LeClainche, Orlando, FL, for Defendant-Appellant.

Richard E. Fee, Michael S. Hooker, Tampa, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, DUBINA and CARNES, Circuit Judges.

DUBINA, Circuit Judge:

Appellant Town of Lake Hamilton ("the Town") appeals from a judgment entered on a jury verdict against it for violations of Appellee Heather Sewell's ("Sewell") constitutional rights. For the reasons that follow, we reverse.

BACKGROUND FACTS

At approximately 3:00 a.m. on May 13, 1991, Paul Stines ("Stines"), an officer with the Town's police department, stopped Sewell, a 22-year old female, for speeding. Stines searched Sewell's car, with her consent, and found an illegal duplicate driver's license and a bag of marijuana.[1] Stines had Sewell follow him to the police station, where they arrived at 3:30 a.m. Realizing they were alone at the station, Sewell became hysterical and believed that Stines was going to rape her. Stines issued a ticket to Sewell. Stines then offered to let her go on the drug charge if she consented to a strip search. Sewell consented to a strip search by a female officer but Stines refused. Stines persisted in his threats to "ruin her life" with the drug charge unless she submitted to a strip search by him. He also indicated that he would accept any sexual advances made by her during the strip search. Eventually, Sewell undressed and lay naked on the floor

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[1] It appears, although it is not clear from the record, that Stines planted the marijuana in the car. The marijuana was found later in Stines' locker.

as instructed. Stines molested her but no sexual intercourse took place. Stines then permitted Sewell to dress and leave the police station. Sewell reported the incident to the State Attorney's office the next morning.

Earlier that same morning, Stines had stopped a 20-year old woman, Sharon Washington ("Washington"), at approximately 2:14 a.m. for speeding. Stines conducted an inappropriate patdown search of Washington and told her that women could offer their bodies to him to get out of a ticket. Washington refused and Stines wrote her a ticket. Washington's boyfriend reported the incident to the Haines City dispatching service at 3:11 a.m.[2] The dispatcher told Washington's boyfriend that the police chief was not on duty and instructed him to call back the next day during normal business hours. Washington reported the incident to Police Chief Freeman ("the Chief") the next day.

Sewell brought a 42 U.S.C. § 1983 action against the Town alleging violations of her Fourth, Eighth, and Fourteenth Amendment rights. The district court denied the Town's motion for summary judgment based on failure to state a claim for municipal liability. After a trial, the jury awarded Sewell $452,000 in damages. The district court denied the Town's motions for judgment as a matter of law, remittitur, and a new trial.

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[2] Lake Hamilton is a small town of approximately 1,000 residents. The Town employs five police officers. Because of its small size, calls to the police station are routed to the dispatcher in neighboring Haines City whenever the station is unmanned. The police station typically is unmanned at night and was unmanned on the night of May 13, 1991.

The Town then perfected this appeal, raising several issues. We address only one: Whether the district court erred in finding that the Town could be liable for the actions of Stines, and thus wrongly denied the Town's motions for summary judgment and for judgment as a matter of law. We review *de novo* the district court's rulings on these motions. *Daniel v. City of Tampa*, 38 F.3d 546, 549 (11th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2557, 132 L.Ed.2d 811 (1995).

DISCUSSION

A municipality may be held liable under § 1983 if the plaintiff shows that a "custom" or "policy" of the municipality was the "moving force" behind the constitutional deprivation. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690-94, 98 S.Ct. 2018, 2035-38, 56 L.Ed.2d 611 (1978). A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1479-80 (11th Cir.1991). A custom is a practice that is so settled and permanent that it takes on the force of law. *Monell*, 436 U.S. at 690-91, 98 S.Ct. at 2035-36. Obviously, the Town has no policy commanding its officers to barter arrests for sexual favors. Likewise, the Town has no custom of allowing such behavior on the part of its officers. However, municipal liability also may be based on a claim of inadequate training "where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants [such that the failure to train] can be properly thought of as a city 'policy or custom' that is

actionable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989). Sewell's claim is a failure to train and supervise claim.

It seems apparent to us that Sewell cannot establish deliberate indifference on the part of the Town. As the Second Circuit has held:

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens. . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

Walker v. City of New York, 974 F.2d 293, 299-300 (2nd Cir.1992), *cert. denied*, 507 U.S. 972, 113 S.Ct. 1412, 122 L.Ed.2d 784 (1993) (applying *City of Canton*, 489 U.S. at 390 n. 10, 109 S.Ct. at 1205 n. 10). We are persuaded that the Second Circuit's interpretation of *City of Canton* is correct. Applying the *Walker* reasoning to the facts of this case, we cannot say that the Town acted or failed to act in such a way as to constitute deliberate indifference.

For the foregoing reasons, we reverse the judgment entered on the jury's verdict and remand this case to the

district court with directions that judgment be entered in favor of the Town and against Sewell.

REVERSED and REMANDED.[3]

---

[3] Because we have concluded that the Town cannot be held liable for the actions of Stines and have reversed the district court's judgment, we need not address the remaining issues presented in this appeal.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HEATHER ANN SEWELL,

Plaintiff,

vs.

TOWN OF LAKE HAMILTON, FLORIDA,

Defendant.

_____/

CASE NO. 93-2037-CIV-T-25A

(Filed March 8, 1995)

ORDER

Upon consideration of the pending motions, responses to such motions, and the record herein, it is **ORDERED** that:

1. Defendant's Motion for Summary Judgment (Dkt. #22) is **DENIED.** There exist genuine issues of material fact whether Defendant's policies, customs or omissions caused Plaintiff's injuries and whether Defendant is thereby liable under 42 U.S.C. § 1983. *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978); *Vineyard v. County of Murray, Georgia,* 990 F.2d 1207 (11th Cir. 1993); *Anderson v. City of Atlanta,* 778 F.2d 678 (11th Cir. 1985).

DONE AND ORDERED at Tampa, Florida, this 7th day of March, 1995.

/s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF DISTRICT OF FLORIDA

HEATHER ANN SEWELL

V.

TOWN OF LAKE HAMILTON, FLORIDA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-2037-CIV-T-25A (Filed May 2, 1995)

[XX] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[__] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered on behalf of the plaintiff, HEATHER ANN SEWELL in the amount of $452,500.

May 2, 1995
Date

DAVID L. EDWARDS,
CLERK
Clerk

/s/ Anne L. Haff
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF DISTRICT OF FLORIDA

HEATHER AND SEWELL

V.

TOWN OF LAKE HAMILTON, FLORIDA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-2037-CIV-T-25A (Filed Nov. 21, 1995)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered on behalf of the plaintiff, HEATHER ANN SEWELL in the amount of $452,500, including attorneys's fees and costs incurred through May 9, 1995, in the amount of $157,403.00.

November 21, 1995
Date

DAVID L. EDWARDS
Clerk

/s/ Illegible
(By) Deputy Clerk

Supreme Court, U.S.
FILED
DEC 15 1997
CLERK

No. 97-651

In The

Supreme Court of the United States

October Term, 1997

HEATHER ANN SEWELL,

Petitioner,

vs.

TOWN OF LAKE HAMILTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

D. ANDREW DeBEVOISE
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STATEMENT OF THE CASE

A. Procedure: Petitioner, Alleging A Criminal Attack On Her By A Town of Lake Hamilton Police Officer, Sued Only The Town And Only For A Violation Of 42 U.S.C. § 1983.

As this Court most recently observed in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, 137 L. Ed. 2d 626, 117 S. Ct. 1382, 1390 (1997),

> [A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with deliberate indifference as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice.

Respondent agrees with the Petitioner's statement of the case in so far as the procedural history of this case is outlined. The Respondent would, however, pause only to emphasize that the Petitioner (Plaintiff below) *chose* to sue *only* the Town of Lake Hamilton and *only* under a theory of 42 U.S.C. § 1983 liability for the criminal assault on her by Officer Paul Stines. There were no claims alleged against the perpetrator of the sexual assault, nor did the Petitioner allege a state law negligence claim against the Town for the acts of its officer. Unlike § 1983 actions, damages for a state law negligence claim against the City would have been limited pursuant to state statute. *See* § 768.28, Fla. Stat. And, also unlike § 1983 actions, there are no attorneys' fees awarded to a successful plaintiff under a state law negligence claim. The Respondent draws the Court's attention to the legal backdrop for Petitioner's decision on how to prosecute her claim because, ultimately, the Respondent's argument throughout has been that the nature of Petitioner's

claim is not one suited to the particular requirements of § 1983 municipal liability.

B. Facts: Petitioner Overemphasizes Legally Insufficient But Dramatic Facts In Hopes Of Distracting The Court From the Legal Inquiry Relevant To The Remedy She Chose To Pursue.

The Petitioner states that the Respondent had absolutely no written training program or policies and procedures regarding officers' interaction with female suspects. She then implies that the absence of a formal policy on these matters causally led to the unprecedented criminal actions of Officer Paul Stines. She recounts in detail the event of the sexual assault by Stines and attacks the Town for failing to prevent it.

Below, the Respondent takes issue with the Petitioner on several points in the factual summary of the case regarding the Respondent's policies, customs, and procedures. But it is critical as the Court reviews the differing versions of the facts adduced at trial that the Court keep in mind that, even if the Petitioner's version were completely accurate, it cannot be held that this single unprecedented criminal act of Stines was *caused* by the Town. Additionally, even under the Petitioner's version of the facts, it is still not legally possible to conclude that a town is deliberately indifferent to the rights of its citizens simply because it fails to train its officers not to commit blatant criminal acts.

As of May 13, 1991, the date of the incident which is the subject of this lawsuit, officer Paul Stines was one of just five police officers employed by Lake Hamilton, Florida. The Town was only 1 mile by 1 mile in size, with a population of approximately 1,000. Until the May 13, 1991 incident forming the basis of this lawsuit, the Lake Hamilton Police Department had *never* received a complaint regarding *any* form of sexual

harassment by *any* of its officers or employees. (R4-109-18, 24).

Officer Stines graduated number one in his police academy class and, until May 13, 1991, there had been *no* complaint from the public regarding Officer Stines' conduct as a police officer. There was no information from any source that would have led the Town or the Lake Hamilton Police Department to anticipate misconduct on the part of Stines. Stines' co-workers testified that they observed him in the field, including interaction with female suspects, and that they saw nothing that would lead them to believe that Stines would commit the acts alleged here. (R1-32-130; R4-108-77; R4-109-4; R4-108-194; R4-108-72, 77).

Contrary to Petitioner's implication that officers working for the Town received no training whatsoever, officers employed by the Town, including Stines, received training at the police academy involving more than 600 hours of work. The training also included hands-on instruction in police work, with specific training in how to conduct a traffic stop, make an arrest, and the search of vehicles. (R4-108-44, 45, 123; R4-108-44, 45, 80, 81, 107).

Most importantly, and in accord with the simplest of common sense, the officers knew, without any specific written guidance, that it was improper to request sexual contact in exchange for ignoring criminal activity. The officers were specifically instructed at the Police Academy that it is improper to make a sexual advance to a suspect during a traffic stop. (R4-108-84; R4-108-123).

Contrary to Petitioner's suggestion that officers were hired, given a badge and a gun, and let loose, officers employed by the Town received field officer training. This training included familiarizing the officer with the Town, paperwork practices and

procedures, and accompaniment by a veteran officer for at least two weeks. Specific practices and policies for on-duty officers included reporting time and mileage to the dispatcher when picking up and transporting a female suspect. Police communications were monitored on a 24-hour basis by a scanner located in the police chief's home. The Town used dispatchers stationed in the neighboring Haines City Police Department and those dispatchers were regulated by Haines City police officials. These dispatchers made regular radio safety checks, usually hourly, of Lake Hamilton on-duty officers. (R4-108-105; R4-108-152; R4-108-179, 180; R4-108-118, 122, 161, 162; R4-106-153).

Petitioner points to the testimony of Respondent's expert regarding absence of certain written police procedures and claims that the expert testified that the Town should have had written guidelines. Petition at 7. Petitioner's rendition of this expert's testimony is based on an out of context statement that Petitioner distorts into a claim of civil rights liability. What the expert *actually* concluded was that the Town was "remiss" for not having a written procedure *but* that the Town's reliance on police academy training was reasonable, that the small size of the Town rendered the way in which the Town supervised its officers reasonable, that the officers had a perfectly valid personnel manual, and that the oral policies and procedures among the handful of officers employed there was consistent and reasonable as regards the stop and search and frisk of female traffic suspects. (R5-109-146-150).

Petitioner's framing of the case with out-of-context statements is symptomatic of her approach to the appeal and illustrates her misperception of the nature of a civil rights suit against a municipality. She claims that officers received no training whatsoever in how to deal with female arrestees, then blames her assault on the lack of training. Aside from the fact

that the officers did receive such training (as described in the preceding paragraphs), no reasonable person could come to the conclusion that a lack of training in handling female traffic suspects *caused* Officer Stines to criminally attack the Petitioner.

Petitioner claims that the Town did not have a policy on sexual harassment and that this lack of policy *caused* Stines to attack her. But given that the officers undeniably knew that they should not extort sex from female traffic suspects, it is certain that lack of a policy on sexual harassment did not cause Stines to attack the Petitioner. And, because the act was so extreme — indeed blatantly criminal — how can one legally conclude that a town is "deliberately indifferent" to the rights of female arrestees for not training its officers against something so clearly wrong?

In a distortion of the legal significance of the record in this case, Petitioner recites for the Court the testimony of Town Police Chief Freeman. Petition at 9. The Petitioner concludes that, because the Chief knew before the incident that it was *possible* that an officer could abuse his position when alone on shift, leaving him alone *caused* Stines to commit his assault on Petitioner.[1] As will be seen below, § 1983 municipality causation requires much, much more than a simple general knowledge of a risk that an officer can do something — anything — wrong when he is unsupervised. Where an officer has no history of misconduct, and there has been no complaint of a widespread problem (or even an isolated one for that matter), proof of

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1. Petitioner suggests at one point that the Town police chief "knew he had a volatile situation" by virtue of the fact that, in this tiny one square mile town of 1,000 people he relied on his officers' judgment not to attack people. Petitioner's characterization of the situation as "volatile," where there had never before been any complaint against any officer for anything remotely resembling this case, is melodramatic in the extreme.

opportunity does not equate with proof of causation. As this Court noted in *Brown*:

> Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

Brown, 117 S. Ct. at 1391.

Similarly, the mere creation of opportunity for an officer to engage in unprecedented and egregious criminal activity does not invariably lead to civil rights liability for the municipality. As seen below, the Town of Lake Hamilton, with no warning whatsoever of Stines' criminal attack on Petitioner, is certainly far less at constitutional fault than the County exonerated by this Court in *Brown*.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DID NOT MEET THE CLEAR MUNICIPAL LIABILITY REQUIREMENTS OF *MONELL*.

Petitioner observes that in *Brown*, two justices of this Court, joined by two others, wrote to express their frustration with application of the municipal liability theories of *Monell v. New York Dept. of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) to the facts in *Brown*. Specifically, Petitioner

notes that the dissenting justices suggested that a reexamination of the respondeat superior, causation and municipal culpability issues growing out of *Monell* be reconsidered. Petitioner contends that the instant case is a "compelling example of the complexity and confusion in the area of §1983 law" and that this case provides the Court with an opportunity to revisit *Monell*. Petition at 12. For the reasons that follow, Petitioner is incorrect.

It bears mentioning at the outset that the parties are actually in agreement as to the high hurdles placed upon civil rights plaintiffs who *choose* to sue municipalities. As the Petitioner observes, this Court and the various circuit courts of appeal demand both that a municipality's custom or policy *cause* the constitutional deprivation, and that the policy or custom be adopted with deliberate indifference to the rights of the plaintiff or the public. In this regard, the Petitioner's call to reexamine *Monell* is easily dispatched. If the Court does not wish to disrupt two decades of civil rights law, choosing instead to leave *Monell* undisturbed, then this Petitioner cannot recover against this municipality on these facts. Again, Petitioner elected to institute suit against the Town of Lake Hamilton and only for a violation of § 1983.

This Court in *Brown* discussed in general terms the scenario wherein a plaintiff can prove a failure to train municipal civil rights case in the absence of prior incidents. *Brown*, 117 S. Ct. at 1391. This Court summarized the relevant holdings of *Monell* and *City of Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989), in this way:

> [I]n a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring

> situations. The *likelihood* that the situation will recur and the *predictability* that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that the municipal policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequences of the policymakers' choice . . . . The *high degree of predictability* may also support an inference of causation — that the municipality's indifference led directly to the very consequence that was so predictable.

Brown, 117 S. Ct. at 1391 (emphasis added).

Petitioner's allegations that the facts of this case meet that test are unfounded. As the Eleventh Circuit recognized in its decision in this case, there are some courses of action which are so obviously wrong that they cannot be linked as a matter of law to an official policy or custom. *See* Appendix 5 to Petition; slip op. at 5. That is, because Stines' conduct was so unpredictable, unprecedented, and so blatantly wrong, the Town was neither at fault for having been deliberately indifferent to such a bizarre risk nor the cause of Stines' criminal behavior.

Petitioner contends that creating the possibility of a constitutional violation equates with causing it because "history and human nature" suggest that it is inevitable that male officers will succumb to "a powerful incentive" to manipulate or attack female suspects. Petition at 25. Aside from Petitioner's repugnant suggestion that the Town should have assumed that its employees were likely to sexually attack its citizens, Petitioner commits the common fallacy of mixing opportunity with causation. *Brown*, 117 S. Ct. at 1391.

The very reason that the mere creation of some general risk

is insufficient to lead to municipal liability is because, ultimately, mere creation of an undefined risk leads to respondeat superior. *Id.* at 1388, 1391.

The defect in Petitioner's reasoning is that she assumes, as did the plaintiff in *Brown*, that she merely needs to show an inadequate policy and a bad result to prevail. That is not the law. Regardless of how much criticism is levelled at the Town of Lake Hamilton for absence of a formal written sexual harassment policy, or for allowing male officers to work alone, and regardless of Petitioner's traumatic experience, the ultimate question remains: Did the Town's lack of policy or supervision, adopted with deliberate indifference, cause Petitioner's injuries? Because of the nature of Stines' actions, the Eleventh Circuit Court of Appeals held that it could not. That decision is in accord, not just with the evidence in the case, but with the well-reasoned municipal liability principles of *Monell* and *City of Canton*.

II.

THERE IS NO CONFLICT WITH *VINEYARD V. COUNTY OF MURRAY, GA.*

Petitioner's errant deliberate indifference reasoning is starkly demonstrated by her assertion that the facts of this case parallel the evidence in *Vineyard v. County of Murray*.[2] Petition at 16. They do not. To the contrary, a comparison of the facts and decisions in this case and in *Vineyard* provides a strong basis for concluding that the Town of Lake Hamilton is not constitutionally responsible for Stines' attack on Petitioner. And, notwithstanding Petitioner's protestations to the contrary, a comparison of the conduct alleged in the two cases demonstrates that the standard of municipal liability was correctly applied by the Eleventh Circuit in this case.

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2. 990 F.2d 1207 (11th Cir. 1993), *cert. denied*, 510 U.S. 1024, 114 S. Ct. 636, 126 L. Ed. 2d 594 (1993).

Vineyard involved a claim that law enforcement officers abused their authority to use physical force. The use of force is a necessary and obvious part of police work and it is therefore reasonable to anticipate, and train for, the circumstance where an officer must make a choice between levels of force. There have been any number of decisions, including *Vineyard*, which have observed that the need to train for use of force is so obvious that a municipality is deliberately indifferent if it fails to do so. Plaintiff's expert in *Vineyard* specifically noted that the purpose of use of force policies, training, and supervision was "to stop the use of gratuitous force." *Vineyard*, 990 F.2d at 1213. Some level of police use of force, in other words, is expected and acceptable. It is the obviously foreseeable need for an officer to be able to draw the line between proper and improper force that allows a lack of adequate training and supervision in the use of force to rise to the level of deliberate indifference required by *City of Canton*. There is no obviously foreseeable need for an officer to be able to draw the line between proper and improper sexual assault. Thus, failing to train, instruct or otherwise supervise Officer Stines to prevent it was not deliberate indifference to the rights of Sewell.

At page 17 of the Petition, another significant misinterpretation of testimony is made by Petitioner. According to Petitioner, Police Chief Freeman testified that he knew of a "risk" that an officer might sexually assault a female suspect. Petitioner then contends that this "risk" meets the strict "deliberate indifference" standards of *Monell* and *Canton*. Knowledge of an unsubstantiated, never-before-occurring, extreme and criminal "risk" is the absolute thinnest of threads on which to hang a claim that the Town of Lake Hamilton was the moving force behind Stines' conduct. This Court should flatly reject it. Petitioner compares *City of Canton* and *Monell* causation questions in the contexts of excessive force cases with the criminal sexual assault in the instant case. Petitioner observes

that excessive force claims under the causation standard implicit in the Eleventh Circuit's opinion in this case more readily yields municipal liability for excessive force cases than it does for criminal acts of sexual assault.

> That reasoning produces the absurd result that the more egregious the employee's conduct, the more likely the exoneration of the municipality, despite the fact that the municipality was at fault.

Petition at 21.

Of course a municipality is more likely to be liable under § 1983 for a claim of excessive use of force by its officers rather than criminal actions of those officers. This is a direct and sensible result mandated by the legal proposition of *Monell* that municipalities are liable for only those constitutional violations they ***cause***. Because municipalities know that their officers will have to use force, failure to train them on it can sometimes be said to cause a constitutional abuse of the police officer's legal authority to use force. *See, e.g., Vineyard*. But, where an officer — without any warning to the municipality — undertakes a blatantly criminal enterprise, then it is legally inconceivable that a municipality could be said to have *caused* it. The difference is that police officers have the authority by virtue of their municipal employment to use force. They do not have the authority to sexually assault suspects.

It bears repeating here that Petitioner sued only the Town, and only for a violation of § 1983. When the Petitioner states that the Town was "at fault," it must be remembered that the only question of fault of the Town at issue here is one of constitutional dimension. Petitioner may not gloss over the degree of fault that must be shown in a § 1983 case in hopes that, at some point, the degree of the Town's arguable common

law negligence will rise to the requisite level of showing § 1983 causation. One need only read the Petitioner's Statement of the Case to recognize the effort to blur the line between the two. This was *not* a state law negligence case and common law principles of the Town's "fault" do not sufficiently define § 1983 causation.

Petitioner claims that a number of policy and procedure inadequacies proved an "abdication" of control by the Respondent Town. Petition at 16. Among these inadequacies are claims that the Town failed to formally train or supervise new recruits, violated Florida law on the receipt, investigation and determination of citizen complaints, staffed its midnight shift with lone male police officers, and failed to maintain policies regarding sexual harassment. Yet it is painfully obvious from a review of these alleged facts that an application of the law of § 1983 could not possibly yield liability in this case. How can anyone seriously contend that absence of a formal sexual harassment policy *caused* Stines to attack Petitioner? Even more importantly, what does it portend for the thousands of small town police departments around the country if it is unconstitutional to have only one officer on duty at off-peak times?

Petitioner claims that the Town's police chief testified that absence of the above-described policies "created the risk of a police officer assaulting a female suspect." Petition at 17. Chief Freeman testified that absence of supervision would naturally mean that one could not prevent some criminal actions by officers because there is no one there to stop them. But it is too great a leap to claim that his testimony was that the absence of supervision *caused* this incident to take place.[3] Where there is

3. Petitioner alleges in a single hasty and unsupported sentence that an unmanned police station in a town of 1,000 people at three o'clock in the morning "caused Officer Stines to commit his assault." Petition at (Cont'd)

prior notice of particular wrongdoing, or failure to train for situations within which the police may be presumed to have to make legitimate choices between courses of conduct, one can show deliberate indifference by a municipality in its preparation of the officers for that circumstance. But one cannot simply assume in context that the failure to so train is the causal element in a sexual assault. That is no more true than the claim that absence of supervision causes a police officer to commit any other type of crime.

What is perhaps most disturbing about Petitioner's contention about supervision of lone male police officers is the implicit premise that all male officers are predisposed to this type of behavior. The Petitioner claims that the Town was deliberately indifferent to the rights of Petitioner because it allowed a single male officer to patrol the Town in the early morning hours — as though it was the lack of supervision that caused Stines to act as he did — based on nothing more than a generalized knowledge that an officer might engage in some type of misconduct. If so, is it not *always* unconstitutional to allow *any* male employee of *any* municipality to be alone with a female member of the public in *any* setting?

III.

THE "OBVIOUSLY WRONG" TEST MAKES COMMON SENSE.

Persuasive to the Eleventh Circuit's determination that there could be no policy or custom of the Town that caused this event was the Second Circuit's opinion in *Walker v. City of New York*, 974 F.2d 293 (2nd Cir. 1992), *cert. denied*, 507 U.S. 961, 113

(Cont'd)

25, n.3. Respondent submits that the illogic of this claim speaks volumes about Petitioner's colossal confusion of the creation of opportunity with the causing of unconstitutional conduct.

S. Ct. 1387, 122 L. Ed. 2d 762 (1993). In *Walker*, police officials and an Assistant District Attorney (ADA) committed perjury, and the ADA withheld exculpatory evidence in convicting an innocent man, Walker, of murder. *Id.* at 295. The conviction was overturned and Walker was set free some 19 years later when the illegal actions of the police officials and the ADA were discovered.

Walker sued the City under § 1983, arguing that the City should have trained and supervised its police so that they would not commit perjury. He also claimed that the City was independently liable under § 1983 for the actions of the ADA in withholding exculpatory evidence. Despite the atrocious conduct of the officials involved in the conviction, the district court dismissed Walker's complaint — *precisely because* the acts were so outrageous that there was no obvious need to train officials not to commit them. On appeal, the Second Circuit affirmed the dismissal as to the perjury-related contentions, but reversed as to the *Brady v. Maryland*[4] exculpatory evidence violations by the ADA.

Citing the need to provide training and guidance in the pursuit of fleeing felons, the Second Circuit rendered a holding that foretold the opinion of this Court in *Brown*:

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response — to follow one's oath, not to commit the crime of perjury, and to avoid prosecuting the innocent — is obvious to

4. 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

> all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

Walker, 974 F.2d at 299-300.

As in *Walker*, the Eleventh Circuit held in the instant case that Stines' conduct was so egregious, so criminal, and so outside the realm of acceptable police behavior, that it would be absurdly unreasonable to demand that the Town of Lake Hamilton anticipate and train against it. By way of comparison, the Town of Lake Hamilton must, like all police departments, assume that its officers will be required to use force in apprehending suspects. The Town might be deliberately indifferent to the rights of suspects if, knowing that force will be necessary, the Town chooses not to instruct its police officers in proper use of force. At some point, however, the Town must be entitled to rely on the good sense of its officers not to attack the public.

Even more illustrative of the critical importance of the "obviousness" line in these cases is the fact that the *Walker* court, having upheld dismissal of the claim based on police perjury, held that the ADA might have created liability for the City in failing to meet his *Brady* obligations. The Second Circuit's rationale behind this result was twofold. First, in contrast to the commission of perjury by the police, the district attorney knew "to a moral certainty" that ADAs would acquire *Brady* material. *Walker*, 974 F.2d at 300. Second, again in contrast to the commission of perjury, the determination of which evidence to turn over under *Brady* was unclear at the time of the original conviction, requiring training and supervision to make sure that the ADAs acted appropriately. *Walker*, 974 F.2d at 300. It has never been legal for police officers to sexually attack or barter

with their suspects. One wonders exactly what kind of training the Petitioner believes the Town of Lake Hamilton should institute to prevent its officers from attacking members of the public.

In the instant case, the Eleventh Circuit similarly could not hold that Chief Freeman or the Town of Lake Hamilton knew "to a moral certainty" that its officers would be called upon to choose when it would be permissible to sexually assault a suspect. The incident that forms the basis of this case is simply so far removed from the worries town officials understandably should have for their police officers that, as a matter of law, the Town was not deliberately indifferent for not having anticipated it. As the court in *Walker* observed:

> [P]laintiff Walker has catalogued a host of misdeeds by city employees that led to his wrongful imprisonment. Some of these misdeeds relate to such basic norms of human conduct — the duty not to lie or persecute the innocent — that in the ordinary case a municipal policymaker need not expend precious resources on training or supervision but can instead rely on the common sense of her employees.

Id. at 301.

Petitioner argues that the Eleventh Circuit in this case misapplied the "obviously wrong" test in *Walker*. Specifically, Petitioner contends that the focus in this Court's decision in *City of Canton* is not on the obvious wrongness of the tortfeasor employee's conduct, but on the obviousness of the need to provide the training against it. Petition at 19. Petitioner reasons that the Eleventh Circuit's examination of Stines' conduct improperly shifted emphasis from the Town's policy to Stines' act. A review of *City of Canton*, of *Walker*, and of the decision

in this case demonstrates that Petitioner's distinction is one without a difference.

In this case, as in *Walker*, the conclusion was that the action representing the constitutional deprivation was so obviously wrong that one could not conclude that an official policy or custom, in § 1983 parlance, caused it. The *reason* that the policy or custom could not be said to have caused the action lies in the fact that causation in § 1983 municipal liability cases means that the policy or custom was the "moving force" behind the deprivation. In practice, if the action of the officer is so clearly wrong that it was not caused by the municipality, then it is not obvious that one needs to train against it. That is, if the actions of Stines in attacking the Petitioner cannot be causally related to any policy or custom due to its heinous nature, then neither can one conclude that the need to train against the act was obvious. Petitioner claims that it is error to mix the two questions. But this case demonstrates that the two issues are often functions of the same basic premise. A municipality is not acting unconstitutionally when it does not adopt a policy or custom intended to avoid conduct which is so facially repugnant that a defect in human character — rather than a lack of appropriate policy — is to blame.

IV.

THERE IS NO CONFLICT WITH *CITY OF CANTON*.

Petitioner contends that the Eleventh Circuit's decision in this case cannot be squared with this Court's decision in *City of Canton*. The Petitioner argues that the Town's final policymaker, Chief Freeman, testified that he knew to a moral certainty that a lone male police officer would be alone with a female suspect. Therefore, Petitioner reasons, Chief Freeman acted with deliberate indifference when he did not train his officers on how to act in that setting.

Chief Freeman's knowledge to a moral certainty that his lone male police officers would sometimes deal with female suspects *does not*, by any means, translate to an automatic constitutional duty to train those officers not to attack those suspects. Once again, Petitioner distracts the Court by shifting the focus from what specifically happened in this § 1983 case to general complaints about police procedure. Does a police department need to train its officers in the basics of stopping, questioning, and possibly apprehending criminal or traffic suspects? Certainly, and the Town of Lake Hamilton indisputably accomplished that training through the police academy and field training. But can it also be said that the Town of Lake Hamilton acts unconstitutionally when it fails to anticipate that an officer will coerce a woman to the floor, spread-eagled and nude, because he has "never had a redhead before?" Petition at 5. Of course not.

The Petitioner misinterprets the well-settled law of § 1983 when she contends that the Town of Lake Hamilton knew to a moral certainty that its male officers would confront female suspects, leading to a sufficient risk of criminal sexual assault such as to require training against it. If the Petitioner wants to attack the underpinnings of that law — *i.e.*, *Monell* — she is welcome to do so. But the very transparent appeal to outrage and sympathy in the Petition does not change the fact that Petitioner must live with the consequences of the type of lawsuit she filed. Ultimately, the more outrage one may feel at what happened to Ms. Sewell, the more careful the Court must be to ensure that the party *she has sued* — the Town of Lake Hamilton — is truly at constitutional fault. *Brown*, 117 S. Ct. at 1391.

V.

THIS CASE DOES NOT WARRANT RECONSIDERATION OF *MONELL*.

The Respondent obviously has absolutely no argument with Petitioner's contention that her election to sue *only* the municipality and *only* for a violation of § 1983 makes recovery by her very difficult. Petitioner has suggested that the law of § 1983 itself, rather than the facts of this case, lead to her difficulty in winning this lawsuit. If the law of *Monell* is to remain the law of municipality § 1983 liability, then it is painfully obvious that the Town of Lake Hamilton was neither deliberately indifferent to Petitioner's rights nor the cause of their violation. This is so because Petitioner's proof of fault by the Town simply could not have risen to the level required by *Monell*, *City of Canton*, and now *Brown*. The only question remaining, then, is whether the municipal liability requirements of those cases are sound.

A. Reexamination Of *Monell's* Municipal Fault Requirement Is Not Warranted.

Justice Breyer's dissent in *Brown* raised a number of issues with respect to *Monell's* distinction between vicarious liability and liability due to direct fault of the municipality. There is no doubt but that civil rights plaintiffs will often have a difficult time proving that a municipality caused a constitutional violation and that it did so through a policy or custom that has been adopted with deliberate indifference to constitutional rights. Rather than operating as a justification for relaxing *Monell's* standards, however, the Respondent would point out that this difficulty shows only that the nature of the need for the Civil Rights Act of 1871 has changed in the last 120 years such that the original purpose of § 1983, to root out conspiracies involving

local and state governmental officials, translates now into a justification for holding municipalities liable for the acts of officers *only* when the municipality plays a role in the constitutional violation.

A close examination of the historical backdrop of the Civil Rights Act of 1871 shows a twofold purpose. First, the Congress felt that local and state officials in the Southern States were ignoring their duties in enforcing the provisions of the Thirteenth and Fourteenth Amendments. Because these officials also represented the local judiciary, a remedy in the federal court system was needed to improve the odds for effective enforcement of those amendments. Second, Republican Congressmen wanted a federal tool to battle local and state Democratic leaders who, in concert with the Klu Klux Klan, were attempting to literally ride the Republican party out of the post-Civil War South. As will be seen below, the record of Congressional debate unquestionably proves that the purpose of § 1983 was to provide a federal resource against conspirators, including government officials, who sought to violate the rights of recently freed slaves and drive the Republican party to the North. One hundred twenty years later, and built upon the foundation of the 1871 Act, the statute is appropriately construed as requiring that remedies directly against local governments be had only when the local government plays an active role in the constitutional deprivation.

The extraordinary debate on this legislation is found in the Congressional Globe, 42nd Cong., 1st Sess. (1871), at Appendix pages 67-316 (hereinafter Globe App.). That debate, from Rep. Shellanbarger's comments at the start to Rep. Burchard's impassioned speech at the conclusion, show that the entire bill, including Section 1 (now § 1983), was intended to attack conspiracies of the Klu Klux Klan and Democratic officials in the Southern States. Other sections of the bill included criminal penalties for conspirators as well as authorization for the

President to use national military forces to quell riots and rebellions. Rep. Burchard spoke of Klan conspiracies and their ability to reach local constables and judges, stating that Section 1 was expressly intended to sidestep local officials who were part of the post-War terror targeting freed slaves or Republicans from the North and "afford an injured party redress in the *United States courts*." *See* Globe App. 312 (emphasis added).[5]

Rep. Burchard's statement followed hours of debate during which a number of members of both houses recited tale after tale of disguised Klan members literally getting away with murder as state and local Democratic officials turned a blind eye. Reps. Bright and Maynard, for example, engaged in a question and answer dialogue typical of the issues considered. *See* Globe App. 309-310. In that exchange, Rep. Maynard

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5. Most importantly, and as this Court recognized in *Monell*, the second conference report on the bill substituted a new provision which, rather than create municipal liability for acts of private violence, created liability for any person who learned of an impending civil rights violation but did nothing to stop it. *Monell*, 436 U.S. at 668-669. The earlier version of the conference report, which would have included the Sherman Amendment, was argued to be necessary because the southern municipalities were thought to be part and parcel of the private violence problem. As *Monell* properly recounts, there was at that point an extensive history of federal action representing "affirmative interference" by the Congress in forcing the southern states to act constitutionally with respect to their former slave citizens. Enlisting as many actors as possible — from wealthy property owners afraid of paying damages for a Klan riot to municipalities who would lose their treasuries if they continued to "look the other way" — might have been more effective than the conspiracy provision that ultimately passed, but it would have put poorly equipped people or towns on the front line of the *federal government's* fight to protect United States citizens. That is, vicarious liability for either the private property owners or the local governments would have put them in the business of insuring for (as opposed to ensuring against) the losses experienced by victims of the conspiracies described by the Congress.

described a series of events in Murfreesboro, Tennessee shortly after the Governor of the state was stripped by the Legislature of his ability to enforce laws against, among other things, the Klan. One night, a group of "disguised men" attempted to break into the home of "an old colored man." The homeowner shot and killed one of the marauders (who to the glee of Democratic officials may have been a Republican) and drove the rest away. The "colored man" was immediately arrested, but it was not until federal authorities went to the town for the express purpose of enforcing the Fourteenth Amendment that the marauders were arrested.

Federal enforcement of Constitutional rights, Rep. Maynard argued, was the only means by which the Congress could be sure that local government officials would be held accountable for their part in the conspiracy to violate the rights of, not just former slaves, but their Republican supporters, too. His comments on the "color of law" language are most illuminating. That phrase, he said, "simply declares in substance that whoever interferes with the rights and immunities granted to the citizens of the United States, *though it may be done under State law or State regulation*, shall not be exempt from responsibility to the party injured." *See* Globe App. 310 (emphasis added). These comments demonstrate that the purpose of Section 1 was not to create a whole new class of governmental liability for violation of civil rights by private persons. Rather, Section 1 was needed so as to prevent state and local government officials from hiding behind the official nature of their acts to further their illegal activities with the Klan.

Several Senators and Representatives described the testimony their committees had heard from former Klansmen. Rep. Stevenson recounted the testimony of Mr. William Tolbert who described a mob killing without fear of arrest. *See* Globe App. 291. According to Tolbert's testimony, the Klan was an arm of the Democratic party. Its purpose was "to regulate the

Republican party, break it up if they could, and strengthen the Democratic party." Mr. Tolbert and his compatriots were under strict orders from Democratic and Klan bosses to kill Union Leaguers and Republicans, to search out their meetings and shoot indiscriminately into them. Lack of interference from government officials was guaranteed because, even if they weren't personally involved in the riots, they were certainly part of the conspiracy.

Rep. Stevenson concluded his comments by shaming Democratic party officials, noting that they opposed the bill for purely political reasons and under the guise of "throwing off carpet bag government." *See* Globe App. 299. The only remedy to the Klan and its government supporters was to criminally sanction the conspirators and allow redress in "the national courts." The Klan, combined with local Democratic officials in the Southern States, represented "the germs of another rebellion," Stevenson said. *See* Globe App. 282. The only way to stop them was passage of a bill which would attack the Klan and prevent the local Democratic politicians from assisting them in their activities.

In sum, the record of debate on § 1983 shows that its original purpose was to interpose the federal government, through the federal courts, in the battle over the politics governing the South. The purpose was not to target state and local governments, or its officials, as a *distinct* group of civil rights violators. Rather, so that these officials' *active* part in the conspiracy to drive out the Republicans would not continue, § 1983 was intended to prevent Democratic party members from hiding behind their official authority. The statute's imposition of liability on government officials was directed at those specific officials who played a role in the local atrocities of the Klan and the Democratic party members, not at the *institutions* of the governments themselves. This is in accord with rejection of the

Sherman Amendment's imposition of liability on people and governments who had no direct involvement in the conspiracies.

Most importantly, a reading of the legislative history shows that the statute was intended to provide a means to hold liable and accountable those officials who *actively* conspired to drive the Republicans out of the South, not to create some general vicarious liability for their municipalities. The purpose of Section 1 of the Civil Rights Act of 1871 was not to hold governments liable for damages, but to prevent government officials from hiding behind the official nature of their acts when conspiring with private individuals to violate the rights of the citizenry. There is not one iota of support in the debate over H.R. 320 for the proposition that it was the governments *themselves* upon whom Congress sought to impose liability.[6] In today's § 1983 law, that purpose is served well by the notion that the only means of holding the government *itself* liable is where the government took official action or policy that played a role in the constitutional deprivation.

Petitioner in this case could have sued Officer Stines under § 1983 for violating her rights and, based upon this record, almost certainly would have been successful. But she did not. She chose instead to sue the Town of Lake Hamilton. Without a showing that individual policymaker officials of the Town played the equivalent of a conspiratorial role in the effort to violate her rights, the spirit and letter of § 1983 do not provide a basis for recovery. The Town of Lake Hamilton *itself* had no policy or custom, adopted through an official policymaker, that caused the assault on the Petitioner. Petitioner's effort to cast the net of liability so wide as to include the Town, when it was a rogue

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6. Indeed, if there is to be a reexamination of *Monell*, perhaps it should be about whether there is any municipality liability at all under § 1983, as opposed to whether § 1983 applies only to individual government conspirators.

officer acting alone who violated her rights, stretches § 1983 beyond its stated purpose. Just as § 1983 prevented the Murfreesboro sheriff from hiding behind his badge in the 1870's, § 1983 prevented Stines in the 1990's from using his status as a police officer to escape liability for his attack on the Petitioner. That is all that § 1983 was intended to accomplish and Petitioner's failure to sue the party who violated her rights or prove the modern day equivalent of conspiracy (an official policy or custom causing the deprivation) precludes recovery in this case.

B. This Case Does Not Represent An Appropriate Vehicle For Reexamining *Monell*.

One hundred twenty years after enactment of § 1983, Petitioner seeks to impose on the Town of Lake Hamilton liability for the acts of a person who acted under color of law, but who did so without the benefit of a governmental conspiracy (or official policy or custom) behind him. Simply because this case does not lend itself to municipal civil rights liability is no reason to reverse the underpinnings of § 1983 law. What is missing from Petitioner's brief is a *reason* to reexamine *Monell*. It is one thing to note that at least a portion of the Court would like to rethink *Monell*. What is less clear is whether this is the right case for undertaking that endeavor. The Respondent submits that, even if the Court wishes to reexamine the municipal liability requirements imposed by *Monell*, this case provides a poor record basis for doing so.

In *Brown*, there was an extensive record of prior notice to the municipality's decision maker of the potential for a constitutional violation by the employed tortfeasor. For example, the officer in *Brown* had a record of driving infractions, a guilty plea to criminal driving charges, a misdemeanor conviction for assault and battery and resisting arrest, and charges related to

public drunkenness. *Brown*, 117 S. Ct. at 1387. The only "prior" evidence of a warning in this case is an incident that occurred virtually simultaneously with the assault on Petitioner (the Sharon Washington incident).

Justice Souter's dissent in *Brown* placed great emphasis on the presence of a significant record of prior warnings and on the jury's apparent disbelief[7] of the sheriff's testimony that he did not see those warnings. *Id.* at 1399. Justice Souter specifically observed that the jury could have found, on the strength of the prior warnings, that the tortfeasor employee in that case had

> [S]uch a propensity for violence and a disregard for the law that his subsequent resort to violence was the plainly obvious consequence of hiring him as a law enforcement officer authorized to employ force in performing his duties.

Id. (citation omitted).

If this Court chooses to reexamine *Monell*, the Respondent urges that it do so on the basis of a record that allows a finding of varying degrees of fault by the Town. In this case, the Town could only be liable for Petitioner's injury if *Monell* were completely abandoned and respondeat superior liability allowed. On the other hand, another case like *Brown*, with questions of the degree of warning of improper conduct and sufficiency of investigation by the municipality, would provide a far superior opportunity to rework the standard for showing deliberate

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7. Justice Souter concluded that the jury may have believed that the sheriff lied about what he knew of the officer's record so as to protect his family member and his reputation. *Id.* at 1399. There is nothing in this record approaching that sort of intentional act taken despite a known high risk of unconstitutional conduct by the employee.

indifference. While some of the dissenters in *Brown* questioned complete rejection of *Monell*, all expressed concern over whether the record in that case met the tough standards of municipal § 1983 liability. This case does not represent an appropriate record to revisit those standards and the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Respondent requests that the Court deny the Petition.

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In The

Supreme Court of the United States

October Term, 1997

HEATHER ANN SEWELL,

Petitioner,

v.

TOWN OF LAKE HAMILTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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REPLY BRIEF

Respondent's brief in opposition ironically underscores the need for this Court to grant the petition. The gist of the petition is that the Eleventh Circuit's opinion below cannot be reconciled with this Court's precedent, the Eleventh Circuit's own precedent in *Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.), *cert. denied*, 126 L.Ed.2d 594, 114 S.Ct. 636 (1993), and the complex, confusing, and unsettled state of § 1983 jurisprudence. Rather than directly confronting these issues, Respondent tries to deflect the Court's attention by raising non-issues and ignoring the most significant aspects of the evidence and the law that govern this case. For example, Respondent makes no fewer than six references to the fact that Petitioner elected to sue the Town of Lake Hamilton for § 1983 liability, as opposed to suing some other party or suing Lake Hamilton under some other theory. One wonders what Respondent believes this adds to the Court's consideration of the petition. The petition makes clear that the issue in this case is whether the Town of Lake Hamilton is liable under § 1983 for Officer Stines's sexual harassment and assault of Heather Sewell. That was the issue presented at trial, on appeal, and in the petition. Respondent's repeated references to Petitioner's choice to sue under § 1983 are puzzling, unless viewed as an attempt to distract the Court from the obvious problems created by the opinion below.

Similarly, Respondent simply ignores – as the Eleventh Circuit did in its very brief opinion in this case – all of the evidence that established § 1983 liability. In so doing, Respondent ignores what both the jury and trial judge determined was the greater weight of the evidence.

In that regard, the majority of factual assertions in Respondent's Reply Brief were rejected by both the jury and the trial judge. Rather than acknowledging the overwhelming evidence in this case, Respondent characterizes that evidence as "out-of-context" and a "distortion of the legal significance of the record. . . . " (Opposition Brief at p. 4, 5) Indeed, Respondent's brief reads much like a closing argument on the facts – an argument soundly rejected at trial.

Respondent also completely overlooks – as did the Eleventh Circuit – the fact that this is more than a failure to train or supervise case. Petitioner presented substantial evidence regarding Respondent's total failure to have any system for dealing with citizen complaints about the lone officer on duty on the nighttime shift. Petitioner's expert witness testified:

> Q: Do you have an opinion concerning the adequacy of that custom?
>
> A: I think it's outrageous, particularly if you assign new officers to the midnight shift. They haven't been trained as to Department policies and procedures, there are no guidelines for those officers to follow. It's a time-bomb waiting to explode.
>
> * * *
>
> Q: Do you have, sir, an opinion concerning what [the relationship between Lake Hamilton and the borrowed nighttime dispatcher] should have entailed back in May of 91, how it should have been done?
>
> A: Well, absolutely. There should have been a mechanism there in which complaints of police

> misconduct, complaints of criminal activity by police officers should be immediately reported to the chief or one of the supervisors. That wasn't done. Instead what was done is, you had a lady who's complaining about being sexually assaulted [referring to Officer Stines's prior sexual assault on Sharon Washington]. If the suspect had been a civilian, they would have immediately dispatched a police officer to investigate that crime. In this case, it was worse. It was a police officer on duty acting under lawful authority, that committed or allegedly committed a sexual assault. And there was no immediate response. There was no call to the chief. Instead, it was called between business hours 8:00 to 5:00 Monday through Friday.

(R5:109; 52-53).

Lake Hamilton's flaws went far beyond failing to properly train and supervise police officers. Lake Hamilton failed to have even a minimum system of checks and balances in place to assure any control over or accountability for the lone nighttime officer's behavior. Being a police officer gives an individual absolute and total control over the citizens with whom he comes in contact. That type of power and authority fundamentally requires departmental discipline and a system that creates and imbues in each officer a sense of self-restraint. Describing one of the problems resulting from a lack of written policies, Petitioner's expert witness described a very different departmental atmosphere at Lake Hamilton:

> Q: What are the relevant advantages of having written policies over mere oral customs?

> A: Well, from written policies, the officers are working under a common base, a common knowledge. They are given – they are advised about what is appropriate behavior, what are appropriate procedures to use and they are prohibited from carrying out improper behavior and activities. So, there's consistency, there's an awareness of expectations, and it creates accountability, it creates responsibility. Where that doesn't exist, police officers are basically like the old west. They are given a gun and a badge and told to do justice.

(R5:109; 43). Respondent and the Eleventh Circuit in the opinion below wholly ignore this critical aspect of the case, as though the evidence did not even exist.

Unlike the Eleventh Circuit's opinion below, however, Respondent at least mentions the *Vineyard* case. However, while Respondent offers broad statements that *Vineyard* and the opinion below are consistent, Respondent fails to actually discuss the facts of *Vineyard*. This is not surprising – one cannot elaborate the facts in *Vineyard* and make a case that the opinion below is consistent with *Vineyard*. Instead, Respondent simply characterizes *Vineyard* as an "excessive force" case. The entire point of Respondent's argument is that some level of force is necessary as a part of police work and, therefore, excessive use of force can be a basis for liability on a failure to train or supervise theory:

> The difference [between *Vineyard* and this case] is that police officers have the authority by virtue of their municipal employment to use force. They do not have the authority to sexually assault suspects.

(Opposition Brief at p. 11) However, Respondent offers no suggestion as to what aspect of a police officer's municipal employment authorizes the vicious beating of an ill arrestee while handcuffed to a hospital bed. Characterizing *Vineyard* as an "excessive force" case is a disingenuous oversimplification and an unpersuasive attempt to ignore the irreconcilable conflict between *Vineyard* and the opinion below. Indeed, the fact that the same court can render such diametrically opposed opinions as *Vineyard* and the opinion on review highlights the need for this Court's intervention.

The theme of ignoring the governing facts and law is epitomized by Respondent's surprising reference to "the well-settled law of § 1983. . . . " (Opposition Brief at p. 18) One wonders what Respondent knows that the majority of federal courts in this country do not. Reviewing § 1983 decisions after *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), Justice Breyer characterized § 1983 law as a "highly complex body of interpretive law" and a "body of law that is neither readily understandable nor easy to apply." *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ___, 137 L.Ed.2d 626 at 656, 117 S.Ct. ___ (1997).

Respondent asserts two other arguments that merit reply by Petitioner. First, Respondent characterizes Officer Stines's conduct as "so facially repugnant that a defect in human character" was the sole cause of the assault on Heather Sewell, thus exonerating Lake Hamilton from its failure to train and supervise Officer Stines and to provide the borrowed nighttime dispatcher with

any instructions regarding complaints about the only officer on duty. Respondent purports to take great umbrage at the notion that the Town of Lake Hamilton should have anticipated Officer Stines's conduct. That position – like most taken by Respondent – again ignores the actual evidence in the case, particularly the testimony of Chief Freeman and Petitioner's expert witness.

Respondent argues at p. 16:

> The incident that forms the basis of this case is simply so far removed from the worries town officials understandably should have for their police officers that, as a matter of law, the Town was not deliberately indifferent for not having anticipated it.

With great melodrama, Respondent's brief seems to express shock at the notion that a police department should anticipate that a rookie, untrained male officer with no supervision, alone in the middle of the night with an attractive woman who is completely at the officer's mercy, might succumb to sexual temptation. Respondent's argument is based on a naïve and unrealistic view of the world and human nature. Sexual harassment – particularly as the result of authority – happens everyday. It even happens in small towns.

More significantly, Respondent's rose colored view of society and human nature conflicts with Chief Freeman's candid admission that he did anticipate that Officer Stines would assault a female suspect and simply did nothing about it. Respondent labels Petitioner's claim that the Town of Lake Hamilton should have anticipated Officer Stines's conduct as "repugnant." Once again, Respondent's argument clashes with the evidence – Chief

Freeman's testimony proved that Lake Hamilton did in fact anticipate Officer Stines's conduct.

Finally, Respondent offers a lengthy discussion of the legislative history of § 1983. Respondent's historical review of the legislative debate and political struggle in the South during the Reconstruction is interesting, but adds little to this Court's analysis of the current state of § 1983 law that four justices of this Court have recognized needs repair.

One of the cornerstones of Respondent's legislative debate argument is that Congress's "rejection of the Sherman Amendment's imposition of liability on people in governments who have no direct involvement in the conspiracies" supports Respondent's view that this Court should not consider respondeat superior liability. Contrary to Respondent's characterization, as Justice Stevens pointed out in his dissent in *Oklahoma City v. Tuttle*, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985):

> [T]he debate on the Sherman Amendment – an amendment that would have imposed an extraordinary and novel form of absolute liability on municipalities – indicates that Congress seriously considered imposing *additional* responsibilities on municipalities without ever mentioning the possibility that they should have any *lesser* responsibility than any other person. The rejection of the Sherman Amendment sheds no light on the meaning of the statute, but the fact that such an extreme measure was even considered indicates that Congress thought it appropriate to require municipal corporations to share the responsibility for carrying out the

> commands of the Fourteenth Amendment. (emphasis original, footnote omitted)

471 U.S. at 839, 85 L.Ed.2d at 814.

Equally inaccurate is Respondent's assertion that "There is not one iota of support in the debate over H.R. 320 for the proposition that it was the governments *themselves* upon whom congress sought to impose liability." (Opposition Brief at p. 24). That bold and broad statement overlooks the language of the statute itself. As also explained by Justice Stevens in *Oklahoma City v. Tuttle*:

> As we have frequently noted, § 1983 "came on to the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat 13." **The law was an especially important, remedial measure, drafted in expansive language. The class of potential defendants is broadly defined by the words "every person."** It is now settled that the word "person" encompasses municipal corporations, and, of course, it was true in 1871 as it is today that corporate entities can only act through their human agents. Thus, if Congress intended to impose liability on municipal corporations, it must have intended to make them responsible for at least some of the conduct of their agents. (emphasis added, footnotes omitted)

471 U.S. at 834-835, 85 L.Ed.2d at 811-812.

Respondent has not denied the importance of the question presented. Instead, Respondent asks this Court to ignore the evidence in this case, the obvious conflict between the opinion below and other authority, and, finally, the confounding and confusing state of § 1983 jurisprudence. This case presents an ideal opportunity for the Court to fix an area of the law that is badly broken. A

police officer abused his governmental authority and sexually assaulted an innocent woman, an assault that a judge and jury concluded was legally caused by Respondent's customs and policies. **Indeed, in response to special interrogatories in the verdict form, the jury concluded that Lake Hamilton's customs and policies were maintained with deliberate indifference to Heather Sewell's rights and that those customs and policies were the legal cause of her constitutional injury.** The trial judge concluded the jury's verdict was supported by the evidence. The Eleventh Circuit was able to reverse those conclusions only by writing an opinion that ignored the evidence and directly controlling authority.

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